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NO. 84-943

IN THE SUPREME COURT
of the
UNITED STATES

October Term, 1984

ESTER ELVRUM, et al.,
Petitioners,

versus

LEO WILLIAMS,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

I

INTRODUCTION TO RESPONSE

A. Course of Proceedings

This matter arises from the Indian probate of the Estate of Joe Willessi. The probate was commenced more than fourteen years ago.

Initially the competency of the Testator was challenged by certain heirs at law. In 1977 the Administrative Law Judge (ALJ) upheld the Will and distributed the residuary estate to Respondent Leo Williams.

In 1978 the Bureau of Indian Affairs (BIA), which had drafted and approved Willessi's Will, petitioned to reopen the estate and proposed to distribute the residuary estate to the numerous intestate heirs of Willessi. The Government's theory was that a Quileute Indian is not qualified to inherit pursuant to Section 4 of the Indian Reorganization Act of 1934, 25 U.S.C. §§ 461-479 (1982), (IRA), because he is neither an heir at law nor a member of the tribe where the lands are located[1]. The heirs at law quickly joined with the BIA to reopen the estate.

The ALJ summarily found that the Quileutes were a tribe of the Quinault Reservation within the meaning of IRA § 4

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[1]The Quileute Tribe and the Quinault Tribe both are parties to the Treaty of Olympia, 12 Stat. 971 (1856) and are located along the North Washington State Coast.

since the Quinault Reservation was set aside for the Quileute Tribe, Quinault Tribe and all fish-eating Indians of the Northwest[2]. Accordingly, the ALJ found that Respondent Williams was eligible to inherit through the Will under IRA § 4.[3]

The Secretary of the Interior and the heirs at law appealed to the Interior Board of Indian Appeals (IBIA), which reversed the ALJ. The IBIA held that Respondent Leo Williams was not entitled to

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[2]The ALJ cited in support of his finding: "Treaty with the Qui-nai-elt and Quil-leh-ute Indians, July 1, 1855, and January 25, 1856, 12 State. 971, Cappler, Vol. II, p. 719; Executive Order of November 4, 1873, Cappler, Vol. I, p. 923; Halbert v. United States, 283 US 753 (1931), Solicitor's Opinion M 27796 (Nov. 7, 1934), Estate of Tommy (Tomas) Brown, Pro. 8859-35, Estate of Mary Wheeler, Pro. 86679-35, Estate of Mary Sailto, Pro. 41969-39, Solicitor's Opinion M, 27796 (Nov. 7, 1934)."

[3]The Administrative Law Judge's opinion is set forth in Appendix B.

inherit the allotted lands on the Quinault Reservation by reason of IRA § 4, because he was neither an heir at law nor a member of the Quinault Tribe.

The District Court affirmed the IBIA's decision. The Court of Appeals for the Ninth Circuit reversed, finding that both the Quileute Tribe and the Quinault Tribe are "[T]ribe(s) of the Quinault Reservation. . . ." and either tribe may be considered the tribe in which the lands are located for purposes of IRA § 4. Thus, Respondent Williams is a permissible devisee and can inherit the Quinault Reservation trust lands left to him in Willessi's Will.

B. Statement of Facts

1. Willessi Devised Allotted Lands to Respondent Leo Williams

Joe Willessi was a Quileute Indian. He never married. He lived alternately

with a cousin on the Quinault Reservation (Queets) or with another cousin, Nellie Williams, mother of Leo Williams, on the Quileute Reservation (La Push). In his last years, Willessi lived with Leo Williams and his family on the Quileute Reservation (La Push).

Willessi was not fluent in English. The BIA assisted him in the preparation of his Last Will and Testament and later approved his Will.

Willessi's Will left the residuary of his estate to Respondent Williams. The principal asset consisted of trust lands located on the Quinault Reservation. Willessi, a Quileute Indian, had acquired the trust lands on the Quinault Reservation, half by inheritance from his father, also a Quileute, and half as an original allottee.

2. History of the Quinault Reservation

The Treaty of Olympia guaranteed to the Indians of the Quileute and Quinault Tribes a tract or tracts of land sufficient for their wants. The Executive Order of 1873 designated 200,000 acres as an addition to the 10,000 acre Quinault Reservation for the use of the Quinault, Quileute, Quit and other tribes of fish-eating Indians.

The Allotment Act of 1911, 36 Stat. 1345 (1911), directed the Secretary of the Interior to make allotments from the Quinault Reservation: "[T]o all members of the Hoh, Quileute, Ozette or other tribes of Indians in Washington who were affiliated with the Quinault and Quileute tribes in the Treaty (of Olympia) . . . ."

Later, Halbert v. U. S., 283 U.S. 753 (1931), held that members of tribes affiliated with the Quinault and Quileute

Tribes were entitled to allotments on the Quinault Reservation and that those allotted Indians were not required to reside on the reservation. Dictum in Halbert indicated the Executive Order of 1873 established the larger reservation for the use, not only of the Quinault and Quileute Tribes, but also for the use of the Hoh, Quit and other fish-eating Indians.

In 1914 Congress, 38 Stat. 704 (1944), authorized the Secretary to set aside land on the Quinault Reservation for lighthouse purposes, providing that payment be credited, not to the Quinault Tribe, but to the "Indians of the Quinault Reservation."

In 1935 the Indians of the Quinault Reservation voted to adopt the IRA. Any Indian who resided on the reservation or who resided elsewhere but was allotted and intended to reside on the Quinault Reser-

vation, regardless of his membership in the Quileute or Quinault Tribes or other fish-eating tribes was entitled to vote to adopt the IRA. (Pl. Ex. 1-28; R. 27, 28).

The courts, Congress and the BIA have treated the Quinault Reservation as a reservation for the benefit of both the Quinault and Quileute Tribes. In 1945, the Court of Claims in The Quinault Tribe of Indians v. U. S., 102 Ct. Cl 822, (1945), dismissed a boundary line dispute holding, at 835, that the Quinaults were not entitled to exclusive rights on the reservation:

> The treaty was entered into with both the Quinaielts and the Quillehutes, and article VI of it provided that these tribes might be consolidated with other friendly tribes or bands for the purpose of occupying and enjoying the reservation; hence, when the Executive Order establishing the reservation was issued, acting under the authority of article VI, it set aside the reservation not only for the Quinaielts and the Quillehutes, but also for the Hohs, Quits,

and other tribes of fish-eating Indians on the Pacific Coast.

In 1947, Congress enacted The Act of July 24, 1947, 61 Stat. 416 (1947), which provided in part: "[T]he Quinaielt Tribe is hereby declared to be the proper party plaintiff for the purpose of further proceedings in [the boundary line dispute], and for the purpose of prosecuting the action to a final conclusion on behalf of all Indians having rights in the Quinaielt Reservation." (emphasis added)

It is apparent that the Quinault Indian Reservation was created by Treaty and Executive Order for the use and benefit not only of the Quinault Tribe, but also for the use and benefit of the Quileute, Hoh, Quit, and the other tribes of fish-eating Indians.

II

RESPONSE TO PETITIONERS' ARGUMENTS

A. Summary of Response

This case involves only a dispute about who should inherit trust lands on the Quinault Reservation. The Petitioners are the heirs at law who were not intended by the Testator Willessi to inherit. The Respondent Williams was intended by Testator Willessi to inherit the residue of his estate as provided in the Will drawn by the BIA and approved by the Secretary of Interior.

The opinion of the Court of Appeals below addresses no issue other than the right to inherit under IRA § 4. The opinion was carefully drafted not to go beyond that one issue.

Petitioners have furnished no Rule 17 reasons nor questions of law which have

not been settled by this Court, to justify granting their Petition for Writ of Certiorari.

The Petitioners' proposed interpretation of IRA § 4 would render that law unconstitutional as applied as it would create two classes of Indians with no rational basis. The decision of the Court of Appeals below provides the only result which gives the full and fair effect to the Will of decedent and avoids a constitutional conflict.

This issue will not present itself again because Congress in 1980 amended and broadened the IRA § 4 by providing that permissible heirs of Indian trust lands included any other person for whom the Secretary of the Interior determines that the United States may hold land in trust. 25 U.S.C. § 464 (1983).

B. There Is No Rule 17 Reason Justifying Review

Petitioners argue (argument I, 16-24) that, because of IRA § 4, only an Indian who is a member of the particular tribe governing a reservation is entitled to inherit through a Will. Petitioners' reliance is misplaced. Clearly the Quileute Tribe shares sufficient interest in the Quinault Reservation for purposes of IRA § 4. The Quileute Tribe's property rights on the Quinault Reservation are treaty rights and only Congress can diminish a treaty right. Bryan v. Itasca County, 426 U.S. 373 (1976), Kennerly v. Dist. Court of Montana, 400 U.S. 423 (1971), Menominee Tribe of Indians v. U. S., 391 U.S. 404 (1968).

Petitioners' argument II, 24-35, is much ado about nothing. The Court of Appeals in footnote 5, stated that the

IRA required the Secretary of Interior to approve a tribe's constitution. However, assuming arguendo that Secretarial approval is not required, this alleged error would not alter the Court of Appeals' reasoning and is certainly not a valid reason for granting Petitioners' Petition for a Writ of Certiorari. A-22.

Petitioners' argument III, 36-42, that a jurisdictional nightmare will be created if the opinion is allowed to stand is without merit or basis in fact.

First, the Court of Appeals' opinion as to jurisdiction was restricted to purposes of IRA § 4 application. A-27. The Court further restricted its opinion in footnote 8:

> We do not consider here whether tribes other than the Quinault and Quileute also have jurisdiction over the Quinault Reservation for IRA § 4 purposes under the Executive Order of November 4, 1873. Further, we do not consider the extent of the Quil-

> eute Tribe's jurisdiction over the Quinault Reservation. Cf. Healing v. Jones, 210 F.Supp. 125 (D. Ariz. 1962), aff'd, 373 U.S. 758, 83 S.Ct. 1559, 10 L.ED.2d 703 (1963) (Hopi and Navajo Tribes held to have joint equal interest in . . . of reservation land). (emphasis added)

Appendix A-27.

Secondly, we note that the Department of Interior did not Petition for Certiorari and the Quinault Tribe did not Petition to file an amicus brief. The concerns attributed to them by Petitioners who quoted, at 37, from the Quinault Indian Tribe's Court of Appeals amicus brief were mollified by the Court of Appeals' very restrictive opinion. The spectre of a jurisdictional nightmare exists only in the minds of the Petitioners who stand to gain pecuniary, not jurisdictional, interests by petitioning for certiorari. Should problems of jurisdiction ever arise, and they should not under this case, the Quileute and Quinault Tribes

could always seek a declaratory judgment to determine their respective rights.

Petitioners further argue at page 20 of their petition that the courts and Congress have recognized the exclusive jurisdiction of the Quinault Tribe on the Quinault Reservation. This begs the question and is not entirely accurate. The courts,[4] Congress[5] and the Executive branch[6] have all recognized that the

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[4] Halbert v. United States, 283 U.S. 753, (1931), Quinaielt Tribe of Indians v. U. S., 102 Ct. Cl. 822, 8359, (1945), Wahkiakum Band of Chinook Indians v. Batemen, 655 F.2d 176, (9th Cir. 1981), Short v. United States, 486 F.2d 561, 563, (Ct. Cl. 1973), cert. denied 416 U.S. 961 (1947).

[5] 12 Stat. 971 (1856) (The Treaty of Olympia), 38 Stat. 704 (1914) (Lighthouse Reserve), 61 Stat. 416 (1947) (Boundary Dispute).

[6] The Executive Order of 1873, 1 Kappler, Indian Affairs Laws and Treaties 923 (1903).

(Footnote Continued)

Quileutes as well as the Quinaults share

(Footnote Continued)
The District Court took Judicial Notice of four Title Status Reports describing a 10' strip "[A]long the Quinaielt River in Lot 3" and indentified ownership as "Indians of Quinaielt Res". (emphasis added)

The Title Status Reports are records of the Department of Interior, Bureau of Indian Affairs, Records of Olympic Peninsula Agency, Branch of Real Property Management. The four Title Status Reports are identified as Allotment or Tract Number T3-A, T33-A, T57-A and T224-A.

A note on Title Status Report T224-A stated: "According to the recitals in the deed by which this parcel was conveyed in trust for the Indians of the Quinaielt Reservation, the purpose of the conveyance was to allow the United States to retain control over fishing in the Quinaielt River for the benefit of the Quinaielt and Quillieute Tribes." (emphasis added)

A BIA Document entitled: "LIST OF LEGAL VOTERS - QUINAULT INDIAN RESERVATION 1935 Census Roll," listed 495 Quinault Indians, 141 Quileute Indians and 283 Indians of the Chinook, Chehalis, Cowlitz and other Tribes of fish-eating Indians. Included as Quileutes of the Quinault Reservation were Testator Joe Willessi and Nellie Williams, mother of Respondent Williams. (R. 27, 28).

joint interests in and rights on the Quinault Reservation.

C. Southland Royalty v. Navajo, A Case Not in Conflict

Petitioners cite, at 31, Southland Royalty Company v. Navajo Tribe of Indians, 715 F.2d 486 (10th Cir. 1983) as a case in direct conflict with the lower court's decision. The Southland case involved the right of a tribe to impose taxes without approval of the Secretary of Interior. The case held that non-IRA tribes (whose constitutions had not been approved by the Secretary) could impose a tax without prior approval while IRA tribes, whose constitutions so provided, would require Secretarial approval. The

Southland case is not in conflict with the Court of Appeals' opinion[7].

D. The Petitioners' Proposed Interpretation Would Render IRA § 4 Unconstitutional

An interpretation of IRA § 4 which would defeat Willessi's testamentary scheme would create classifications of testators without a rational basis.

Indians are wards of the federal government and subject to the extensive but not unrestrained congressional power. Worchester v. Georgia, 31 U.S. (Pet.) 515 (1832). Although the legislative power of Congress is very broad because of the trust relationship toward Indians, it is

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[7]The Court of Appeals' comment on the Quinault Tribe's constitution, approved or not approved, was at most a peripheral footnote observation and was certainly not a cornerstone of the court's opinion.

not absolute; the federal courts will review congressional enactments to ensure due process. Delaware Tribal Business Committee v. Weeks, 430 U.S. 73 (1977).

When the federal government classifies individuals in a way which violates the equal protection principle, it will be held to contravene the 14th Amendment and the due process clause of the 5th Amendment. Bolling v. Sharpe, 247 U.S. 497 (1954). Equal protection is the guarantee that similar people will be treated in a similar manner. Tussman & Brock, The Equal Protection of the Law, 37 Calif. L. Rev. (1949).

A classification is permissible under the due process clause only so long as there exists a minimum rational relationship between the classification created and a permissible legislative purpose. Nowak, Rotunda & Young, Handbook of Constitutional Law at 588-9 (1978).

Therefore, if Petitioners' petition is granted, one of the issues would be whether the classification of Indians under Petitioners' interpretation of IRA § 4 meets the minimum rational basis test.

The legislative history demonstrates that the purpose of IRA § 4 was to stop the alienation of Indian trust lands by the Indians and the Government, to keep Indian trust lands for the present and future support of Indians and to avoid the fractionalizing of allotments so that individual Indians will not acquire minuscule shares in allotted lands, creating tremendous management expense. S. Rep. No. 1080, 73rd Cong., 2d Sess. (1934).

Under Petitioners' view, if Willessi, a member of the Quileute Tribe, one of the tribes for whom the Quinault Reservation was created, did not wish to devise his allotted land to an heir at law, Willessi could only name as an heir a member of the

Quinault Tribe. He would not be permitted to name as an heir a member of his own Quileute Tribe.

Thus, IRA § 4 under Petitioner's interpretation would classify Indians into two groups: Group One That group of Indians whose trust lands are situated on the reservation of the tribe of which they are members; and, Group Two That group of Indians, like Willessi, whose trust lands are situated on a reservation other than that of the tribe of which they are members.

There is no discernible rational basis for the classification that would be created by Petitioners' interpretation of IRA § 4. The legislative history of the IRA neither supports the distinction proposed by Petitioners, nor indicates that Congress intended to favor the Quinault tribal members over the Quileute tribal members. No conceivable

legislative purpose would be served by denying to Willessi the right to devise to a member of Willessi's own Quileute Tribe who is not an heir at law, while permitting the same devise by a Quinault Indian to a member of the Quinault Tribe who is also not an heir at law.

The Court should not disturb the Court of Appeals' decision which interprets IRA § 4 in the only manner which complies with constitutional requirements. Power Brake Equipment Co. v. United States, 427 F.2d 163 (CA 9th 1970); Application of United States, 427 F.2d 639 (CA 9th 1970).

III

CONCLUSION

Petitioners' Petition for a Writ of Certiorari should be denied.

Respectfully, submitted this 8th day of January, 1985.

Jon Marvin Jonsson, Attorney
for Respondent Leo Williams

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LEO WILLIAMS,	)	NO. 83-4229
	)	
Petitioner-Appellant,	)	USDC NO. CV 81-700C
	)	
vs.	)	
	)	
WILLIAM P. CLARK, Secretary of the Interior, United States of America, et al.,	)	O P I N I O N
	)	
Respondents-Appellees.	)	

Argued and Submitted June 8, 1984.

Decided Sept. 11, 1984

Appeal from the United States District Court for the Western District of Washington.

Before KILKENNY, NELSON, Circuit Judges, and EAST*, District Judge.

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* Hon. William G. East, Senior United States District Judge for the District of Oregon, sitting by designation.

NELSON, Circuit Judge:

Leo Williams, a member of the Quileute Tribe of indians, appeals the district court's affirmance of a decision by the Interior Board of Indian Appeals (IBIA). The IBIA decision reversed the Administrative Law Judge's (ALJ) ruling that Williams is an eligible devisee of land on the Quinault Indian Reservation. We reverse the district court's decision and reinstate the ALJ's decision ordering distribution of the Quinault Reservation land under the will of William's deceased cousin, Joseph Willessi.

FACTUAL AND PROCEDURAL BACKGROUND

Joseph Willessi, a member of the Quileute Tribe, executed a will in which he devised land on the Quinault Reservation

to Williams. 1/ The property is part of the Indian lands held in trust by the United States. After Willessi died, his heirs contested the will. On February 10, 1972, the ALJ approved it and ordered distribution. The IBIA ordered a rehearing. On January 6, 1977, the ALJ again approved the will and ordered distribution.

On April 5, 1978, the Bureau of Indian Affairs petitioned the ALJ to reopen the estate proceedings. The BIA alleged for the first time that section 4 of the Indian Reorganization Act of 1934, 25 U.S.C. §§ 461-79 (1982) ("IRA"), bars Williams from receiving an interest in trust land on the Quinault Reservation

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1/ Willessi also devised land on the Makah Reservation to Williams. Williams does not dispute the decisions below holding that he is not a permissible devisee of this land. We therefore express no opinion on this issue.

because Williams is neither an heir nor a member of the Quinault Tribe of indians. Three months later, the heirs also petitioned to reopen.

After initially holding Williams ineligible, the ALJ ruled that Williams is an eligible devisee. The ALJ determined that the Quinault Tribe's jurisdiction over the Quinault Reservation is not exclusive. Thus, he determined that the Quileute Tribe also had jurisdiction over the Quinault Reservation such that Williams was an eligible devisee. The IBIA reversed, holding that section four of the IRA bars Williams from inheriting the trust lands because the only permissible devisees were members of the Quinault Tribe and Willessi's heirs. Because Williams fell into neither of these

classifications, he was not a permissible devisee. The district court affirmed the IBIA's decision and Williams timely appeals.

DISCUSSION

I

Standard of Review

This appeal requires us to interpret statutory and treaty language. It is thus subject to de novo review. See 5 U.S.C. § 706 (1983) Cultee v. United States, 713 F.2d 1455, 1457 (9th Cir. 1983) cert. denied, - U.S. - , 104 S.Ct. 2150, 80 L.Ed. 2d 537 (1984). 2/

2/ Before analyzing the effect of the IRA on Williams' status as a devisee of Quinault Reservation land, we must determine whether the IRA applies to the Quinault Reservation. This threshold inquiry is easily resolved because we have previously applied the IRA to this reservation. See Cultee v. United States, 713

[Footnote continued]

II

IRA Restrictions on Land Transfer

The IRA restricts transfers of trust lands on the Quinault Reservation. IRA § 4 (codified as amended at 25 U.S.C. § 464 (1983). 3/

[Footnote continued from previous page]

F.2d 1455 (9th Cir. 1983), cert. denied, - U.S. - , 104 S.Ct. 2150, 80 L.Ed.2d 537 (1984) (applying the IRA to the Quinault Reservation). We reaffirm that holding here.

3/ The test of Section 4 reads, in relevant part, as follows:

> [N]o sale, devise, gift, exchange, or other transfer of restricted Indian lands or of shares in the assets of any Indian tribe or corporation organized hereunder, shall be made or approved: Provided, however, That such lands or interests may, with the approval of the Secretary of the Interior, be sold, devised, or otherwise transferred to the Indian tribe in which the lands or shares are located...and in all instances such lands or interests shall descend or be

[Footnote continued]

IRA section 4 generally prohibits transfers of trust lands, but provides that the Secretary of the Interior may approve certain transfers. Id. "Among the transfers that the Secretary may approve are devises to the members of the Indian tribe in which the lands...are located." Id.

Appellants contend that the Quinault Tribe is the only tribe in which the property at issue is located. Williams,

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[Footnote continued from previous page]

> devised, in accordance with the then existing laws of the State, or Federal laws where applicable, in which said lands are located...to any member of such tribe or of such corporation or any heirs or lineal descendants of such member or any other Indian person for whom the Secretary of the Interior determines that the United States may hold land in trust.

25 U.S.C. § 464 (1983).

in contrast, insists that the Quileute Tribe should also qualify as a tribe in which the land is located. This distinction is the crux of this appeal.

III

Williams is a Permissible Devisee

A. The Tribe Contemplated By Section 4

The language of section 4 gives little guidance concerning the meaning of the phrase "the Indian Tribe in which the lands...are located." An Indian tribe is usually considered to be a political entity, not a geographical area. What Congress intended by referring to the tribe in which the lands are located is therefore not immediately apparent. We may derive guidance in the interpretation of section 4, however, from the General Allotment Act of 1887 ch. 119, 24 Stat. 388 (codified as amended at 25 U.S.C. §§

331 et seq. (1983) ("GAA"), the system governing Indian landholding until Congress enacted the IRA; the IRA was enacted specifically to remedy problems that had been created primarily by the GAA. See Readjustment of Indian Affairs: hearings on HR 7902 Before the House Committee on Indian Affairs, 73d Cong., 2d Sess. (1934) 15-17, 25-27 ("Readjustment Hearings"); To Grant To Indians Under Federal Tutelage the Freedom to Organize for Purposes of Local Self-Government and Economic Enterprise: Hearings on S. 2755 and S. 3645: Before the Senate Committee on Indian Affairs, 73d Cong., 2d Sess. (1934) 15-16, ("Hearings on S. 2755 and S. 3645").

Under the GAA, the Government parcelled out a set number of acres of reservation property to each individual

Indian, a larger set acreage for each family. Id. The government held some of the allotments in trust for allottees; other allottees received title to their property. See W. Canby, American Indian law, 20-21 (1981); F. Cohen, Handbook of Federal Indian Law, 136-138 (2d ed. 1982). The government purchased most of the reservation property remaining after eligible allottees had received their allottments and resold it to settlers. Canby, supra, at 20.

By the 1930's, Indian landholdings on reservations subject to the GAA had decreased by over 85%, and Indians were increasingly impoverished. See Readjustment Hearings, supra, at 15-17; Hearings on S. 2755 and S. 3645, supra, at 16-19. Many of the allotments to which Indians had held title had fallen into non-Indian

hands. Id.; Cohen, supra, at 138. This phenomenon, combined with the government's sales of surplus property to non-Indians, had caused reservations to become checkerboards of Indian-held and non-Indian-held land. Id. As a result, the remaining Indian parcels were too small to be useful for grazing, the sole possible use for most of the parcels. Id. Non-Indians leased most of the parcels, generally at unfairly low rents. Id.

In enacting the IRA, Congress first contemplated that all Indian property would be held and administered by a tribe or a community, which was apparently intended to be either an amalgamation of all tribes on a reservation or in an area or a small segment of such reservation or area. See, e.g., Readjustment hearings, supra, at 26-27, 160; Hearings on S. 2755

and S. 2645, supra, at 26-27. Individual Indians would receive shares in tribal or community assets in exchange for their parcels and would have a preferred right to use what had been their property. Id. Indians, however, opposed this communal ownership. See, e.g., Readjustment Hearings, supra, at 160, 235-37, 299 (Statements of Vern E. Thompson, representing the Quapaw Tribe, James Saluskin, representing the Yakima Tribe, and Ute Arapaho, representing the Cheyenne-Arapaho Tribe). Thus, Congress abandoned the tribal or community ownership concept. See, e.g., Hearings on S. 2755 and S. 3645, supra, at 231-237; 25 U.S.C. §§ 461 et seq. (1983). The version of the IRA that was finally enacted provided that tribes would own and manage lands that the government had sold under the GAA and was

directed to repurchase. See id. That version also, rather than providing for a transfer of individually held property to a tribe or community, extended trust periods and included section 4, which permits Indian landholders to transfer their lands only to other members of the tribe in which the lands are located. See id.

[1] If Congress had intended that in areas in which multiple tribes having property rights had not formed a community, only one tribe would manage the property and thus be the tribe in which the lands are located under section 4, it must also have intended to divest the other tribes and designate that one tribe. Congress did not do so, or refer to tribes as being any other than those having property rights in an area. We

therefore conclude that section 4 comprehends all tribes having property rights in an area. To hold otherwise would require courts to determine which tribes could manage land and which would be divested of their property rights in each reservation or area in which multiple tribes having property rights have not formed a community. We decline to do this. Although courts routinely determine property rights, Indian property rights are unique in that they are directly conferred and subject to comprehensive statutory and administrative regulation. Thus, we decline to hold that IRA divests Indian tribes of existing property rights absent some indication that Congress so intended.

The GAA gave individual Indians property rights in trust lands if their

tribes had rights in those lands. The Supreme Court has recognized that the Quileute Tribe had rights in the Quinault Reservation such that its members were entitled to allotments there. In United States v. Payne, 264 U.S. 446, 44 S.Ct. 352, 68 L.Ed. 782 (1924), the Court found that members of the Quileute Tribe were entitled to allotments of timber land, as well as agricultural land, on the Quinault Reservation. Payne, 264 U.S. at 448-49, 44 S.Ct. at 352-53. This holding, based on the Quileute Tribe's rights under the Treaty of Olympia, necessarily assumes that the Quileute Tribe has rights in the Quinault Reservation.

B. The Quileute Tribe has Treaty Rights in the Quinault Reservation

[2] We turn to an examination of the source of the Quileute Tribe's claimed

interest in the Quinault Reservation. Indian tribes may acquire property interests by treaty. See F. Cohen, Handbook of Federal Indian Law, 472 (2d ed. 1982). Under the Treaty of Olympia, the Quinault and Quileute Tribes ceded their lands to the United States. Treaty between the United States and the Quinault and Quileute Indians (Treaty of Olympia), Art. 1, 12 Stat. 971 (1855 and 1856) reprinted in II C. Kappler, Indian Law and Treaties 719 (1904). In return, the treaty provided that the President would select land in Washington "sufficient for their wants" for their use and occupancy. Id. at art. 2. The treaty further provided that the tribes agreed to move onto the reservation within one year of ratification of the treaty.

In 1873, pursuant to the Treaty of Olympia, President Grant issued an executive order setting aside 350 square miles of land for the use of the Quinaults, Quileutes, two other named tribes, and "other tribes of fish-eating Indians on the Pacific coast." Executive order of November 4, 1873, reprinted in I.C. Kappler, Indian Laws and Treaties 923 (1904). This reservation became known as the Quinault Reservation.

C. The Quileute Tribe's Treaty Rights Have Not Been Abrogated

1. Congress has not abrogated the Quileute Tribe's treaty rights.

[3] Congress may abrogate rights reserved to Indian tribes in treaties. To abrogate treaty rights, however, Congress must clearly and unequivocally express its intent to do so. State of Idaho v. Andrus, 720 F.2d 1461, 1464 (9th

Cir. 1983). We do not find that Congress expressed such intent.

[4] Appellants contend that Congress manifested its intent to abrogate by designating the Quinault Tribe as representative of all Indians on the Quinault Reservation. We disagree. In 1947 Congress designated the Quinault Tribe as the proper plaintiff to litigate a boundary dispute on behalf of all Indians with interests in the Quinault Reservation. Act of July 24, 1947, 61 Stat. 416 (1947). Rather than generally acknowledging that the Quinault Tribe was the sole tribe having jurisdiction over the Quinault Reservation, however, Congress permitted the Quinault Tribe to represent Indians with interests in the reservation only in a particular action, which was identified by number. See H. Rep. No. 671, 80th

Cong., 1st Sess. (1947). The Court of Claims had held that the Quinault Tribe could not recover for the value of land that the United States had appropriated because it determined that other tribes, including the Quileute Tribe, had interests in the land under the Treaty of Olympia and Executive Order of November 4, 1873. Quinaielt Tribe v. United States, 102 Ct.Cl. 822, 834-35 (1945).

2. The Quinault Tribe's unilateral action has not abrogated the Quileute Tribe's rights.

The IRA does not mandate that the tribe in which the lands are located be one tribe. See IRA § 19, 25 U.S.C. § 479 (1983) (defining "tribe" as including "the Indians residing on one reservation"). Nevertheless, appellees contend that only the Quinault Indian nation has exclusive rights in Quinault Reservation property

primarily because: (1) a separate reservation was set apart for the Quileutes sixteen years after the Quinault Reservation was set aside; and (2) its tribal council, according to its by-laws, has made and enforced various rules on the Quinault Reservation. 4/

4/ The Quinault Indian nation also contends that the Department of the Interior has recognized it as the sole tribe exercising jurisdiction over the Quinault Reservation. The authority the Quinault Tribe cites for this proposition is the Department's list of tribes it has determined are eligible to receive Bureau of indian Affairs services. 47 Fed.Reg. 53,130 (1982). There is no suggestion that the geographical or reservation designations, which are not listed for all of the tribes, were included for any purpose other than assisting in identifying the tribes. Accordingly, the reservation designations are entitled to little weight. Cf. Mashpee Tribe v. New Seabury Corp., 592 F.2d 575, 580-81 (1st Cir.), cert. denied, 444 U.S. 866, 100 S.Ct. 138, 62 L.Ed.2d 90 (1979), (questioning the deference due Department's determination

[Footnote continued]

We find that none of these has divested the Quileute Tribe of its rights under the Treaty of Olympia.

[5] First, the creation of a separate reservation for the Quileute Tribe did not extinguish all Quileute treaty rights in the Quinault Reservation. In 1889 a

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[Footnote continued from previous page]

of tribal status, issue on which the Department has not historically spent much effort").

Appellees also contend that his court recognized in Quinault Tribe v. Gallagher, 368 F.2d 648, 655 (9th Cir. 1966) (on rehearing) that the Quinault Tribe exercises exclusive jurisdiction over the Quinault Reservation. Although we stated in Galagher that the Quinault Tribe had a governing body "duly recognized by the Secretary of the Interior," we did so only for the purpose of 28 U.S.C. § 1362 (1983), which permits tribes having such governing bodies to bring certain actions in district court. Gallagher, 368 F.2d at 655-56. We did not hold that the Quinault Tribe exercises or may exercise exclusive jurisdiction over the Quinault Reservation. See id.

reservation was set aside exclusively for the Quileute Tribe. Executive order of February 19, 1889, reprinted in I C. Kappler, Indian Laws and Treaties 923 (1904). Although the treaty specifically authorized the President to remove Indians from the Quinault Reservation, see Treaty of Olympia, art. 6, the Quileute Tribe was never so removed.

[6] Second, the Quinault Tribal Council's exercise of jurisdiction over the Quinault Reservation to make and enforce rules also does not foreclose the Quileute Tribe's property rights in the Quinault Reservation. 5/ The rules that

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5/ The Quinault Tribal Council's By-Laws do not specify the duties of the tribal council. See Quinault Tribal Council Bylaws (1972). We note also that the Quinault Indian Nation By-laws have not

[Footnote continued]

the tribal council has made and enforced have involved such areas as building, health, and safety, see Cardin v. De La Cruz, 671 F.2d 363 (9th Cir.), cert. denied, 459 U.S. 967, 103 S.Ct. 293, 74 L.Ed.2d 277 (1982), and zoning, see Sechrist v. Quinault, 9 Indian L.Rep. 3064 (W.D. Wash. May 7, 1982). The mere fact that the Quinault Tribe has exercised power over the Quinault Reservation to make rules improving the overall quality of life for its inhabitants does not, however, lead inevitably to a conclusion that no other body has any rights in the reservation for any purpose. Even if the

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[Footnote continued from previous page]

been approved by the Secretary of the Interior, although the IRA provision which permits tribes to adopt constitutions so requires. IRA § 16, 25 U.S.C. § 476 (1982).

Quinault Tribe's rulemaking power were exclusive, that should not prevent other tribes from having property rights in the Quinault Reservation.

3. The Quileute Tribe has not extinguished its rights in the Quinault Reservation.

[7,8] The Quileute Tribe's failure to state expressly in its constitution that the Quinault Reservation is part of its territory does not extinguish the tribe's property rights in the reservation. 6/ Treaty rights may be extinguished only

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6/ The Quileute Tribe Constitution and By-Laws states:

> Article I - Territory
>
> The jurisdiction of the Quileute Tribe shall include all the territory within the original confines of the Quileute Reservation as set forth by Executive order of February 19, 1889,

[Footnote continued]

in rare instances. Laches or estoppel may not defeat treaty rights. Swim v. Bergland, 696 F.2d 712, 718 (9th Cir. 1983). Additionally, the Supreme Court has implied that a tribe may not unilaterally relinquish jurisdiction absent explicit congressional authorization and strict compliance with statutory requirements. See Kennerly v. District Court, 400 U.S. 423, 426-29, 91 S.Ct. 480, 481-83, 27 L.Ed.2d 507 (1971). In Kennerly, Congress had specifically authorized tribes to grant concurrent civil jurisdiction to the state in which the tribe was located. Id. at 424-25, 91 S.Ct. at

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[Footnote continued]

> and shall extend to such other lands as have been or may hereafter be added thereto under any law of the United States, except as otherwise provided by law.

481. The statute required, however, that for the grant to be effective, a majority of tribal members had to vote to permit the grant. Id. at 429, 91 S.Ct. at 483. Because only the tribal council, and not the tribal members, had voted to allow the grant, the Court held that the state had no civil jurisdiction. 7/ If the

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7/ Appellees contend that the Quileute Tribe could extinguish its rights by failing to expressly exercise them in its constitution, citing Quechan Tribe v. Rowe, 531 F.2d 408 (9th Cir. 1976). Quechan Tribe, however, is inapplicable here. In Quechan Tribe, we held that we did not need to consider whether the tribe had criminal jurisdiction over non-members because the tribal constitution limited the tribe's criminal jurisdiction to members. Quechan Tribe, 531 F.2d at 411. We also pointed out there that whether a tribe could exercise criminal jurisdiction over non-members under any circumstances was an open question. See id. at 411 n. 4. A tribe may, however, exercise civil jurisdiction over non-members. See Babbitt Ford, Inc. v. Navajo Indian Tribe, 710 F.2d 587 (9th Cir. 1983), cert. denied, - U.S. - , 104 S.Ct. 1707, 80 L.Ed.2d 180 (1984).

tribal council in Kennerly could not explicitly extinguish its rights pursuant to congressional authorization, the Quileute Tribe could not have implicitly extinguished its rights, absent congressional authorization, here.

[9] We therefore hold that both the Quileute Tribe and the Quinault Tribe exercise jurisdiction over the Quinault Reservation and either may be considered the tribe in which the lands are located for purposes of IRA § 4. 8/ A member of either tribe is therefore a permissible devisee of Quinault Reservation lands

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8/ We do not reach Williams's contentions that appellees are barred from attacking Willessi's will, IRA § 4 denies him equal protection, or collateral heirs as well as heirs are permissible devisees under IRA § 4.

[Footnote continued]

under IRA § 4. Accordingly, we reverse and order distribution of the Quinault Reservation land to Williams as provided by Willessi's will.

REVERSED

[Footnote continued from previous page]

We do not consider here whether tribes other than the Quinault and Quileute also have jurisdiction over the Quinault Reservation for IRA § 4 purposes under the Executive Order of November 4, 1873. Further, we do not consider the extent of the Quileute Tribe's jurisdiction over the Quinault Reservation. Cf. Healing v. Jones, 210 F.Supp. 125 (D. Ariz. 1962), aff'd, 373 U.S. 758, 83 S.Ct. 1559, 10 L.Ed.2d 703 (1963) (Hopi and Navajo Tribes held to have joint equal interest in parcel of reservation land).

UNITED STATES DEPARTMENT OF THE INTERIOR

OFFICE OF HEARINGS AND APPEALS

IN THE MATTER OF THE ESTATE OF JOSEPH WILLESSI DECEASED QUINAULT ALLOTTEE 117-1432 OF THE PUGET SOUND INDIAN AGENCY OF THE STATE OF WASHINGTON	MODIFICATION ORDER

This Order is entered in keeping with the Order of the undersigned of May 15, 1979, which offered the various parties the opportunity to file memorandum briefs on the legal question raised concerning the final order of distribution as set forth in my letter to counsel of record of April 3, 1979, a copy of which was attached to the said Order of May 15, 1979. The time allowed for the filing of briefs has expired.

It appears my Order of Reopening and Modification of November 6, 1978, which reversed my Order of January 6, 1977, was in error since the Quinault Indian Reservation is not under the singular jurisdiction of the Quinault Indian Tribe but is in fact a joint jurisdictional area in which such jurisdiction as has been granted by the Congress of the United States lies in all tribes who have been allotted on the reservation and all "fish-eating Indians" of the Northwest. Treaty with the Qui-nai-elt and Quil-leh-ute Indians, July 1, 1855, and January 25, 1856, 12 State. 971, Cappler, Vol. II, P. 719; Executive Order of November 4, 1873, Cappler, Vol. I, P. 923; Halbert v. United States, 283 US 753 (1931), Solicitor's Opinion M 27796 (Nov. 7, 1934), Estate of Tommy (Tomas) Brown, Pro. 8859-35, Estate of Mary Wheeler, Pro. 86679-35, Estate of Mary Sailto, Pro.

41969-39, Solicitor's Opinion M, 27796 (Nov. 7, 1934).

The jurisdictional question of the Quinault Reservation was succinctly but not altogether completely stated by the Commissioner in the Estate of Sailto, supra, as follows:

> "No single or particular tribe or band of Indians can be said to have exclusive jurisdiction over the Quinault Reservation. Such jurisdiction as does exist appears to be a concurrent one vested in the tribes or bands of Indians whose members have been allotted on said reservation."

Inasmuch as I have not found any statutes, regulations or subsequent decisions contradictory to the above-cited precedents, nor have any been cited to me in the filed briefs, and since tribal governmental authority and jurisdiction as granted by the Congress of the United States will not be diminished except by clear, expressed and unequivocal action of that Congress, I am without authority but

to rule there is no one tribal jurisdiction within the confines of the exterior borders of the Quinault Reservation. Brian v. Itasco County, 426 US 373 (1976). If there is to be any enlargement or other change in the jurisdictional rights of any of the affected tribes on the Qinault Reservation, such can only be accomplished by congressional action and not by actions of this department.

It further appears, therefore, that an order should be entered directing distribution of estate assets situate on the Quinault Reservation to the devisee LEO WILLIAMS in accordance with the Third and Residual Clauses of the Last Will and Testament of January 12, 1968.

Additionally, the order should direct distribution of assets of the estate situate on the Makah Reservation to the heirs at law of the decedent in the shares

indicated as found in the Order of February 8, 1979. In view of the above, I do not find it necessary to reach the question of the applicability of the Indian Reorganization Act of 1934 (25 USC 465), assuming its adoption by and compliance with by the Quinault Tribe since there is no indication in the inventory of this estate allotments originally allotted to Quinaults are involved. However, in passing, I merely note as dicta that since there is joint jurisdiction over the total reservation by the various and sundry tribes included within the provision "fish-eating Indians of the Pacific Northwest", any adoption of the Indian Reorganization Act by the Quinaults would appear to only affect their interest as it appears on the reservation and could not affect in toto the total allotments. This seems a reasonable interpretation since to hold

otherwise would in effect make all other allotments on the reservation subject to and subservient to the whims of the Quinault Tribal Council. I find no law in support of this last premise. Additionally, it is also conceivable the Quinault's adoption, assuming such be the case, of the Indian Reorganization Act may not affect landed interests at all on the reservation since it is probable Section 4 of the Act would, under the peculiar circumstances of this reservation, not be applicable in any event and only the organizational sections of the Act would have any force and effect. Such would appear so in view of the circumstances of the creation of the Quinault Reservation, but as indicated, I need not speak to these questions in reaching the decision herein. Suffice it to say devisee LEO WILLIAMS can and does inherit the Quinault interest of this estate, under present

Federal law, to the extent as devised in the Last Will and Testament.

NOW, THEREFORE, the Order approving the Last Will and Testament and decree of distribution of January 6, 1977, as modified by the Order of Reopening and Modification of November 6, 1978, and the modification of February 8, 1979, is further modified so as to direct distribution in accordance with the Third and Residual Clauses of the Last Will and Testament of the decedent of January 12, 1968, to LEO WILLIAMS (as described in the estate inventory) save and except the landed interests of the estate situate on the Makah Reservation, subject to the provisions of the Indian Reorganization Act of 1934 (25 USC 464) which are to be distributed to the heirs at law and in the proportions indicated as determined in the Order of February 8, 1979.

IT IS FURTHER ORDERED the Petition for Contingent Attorney's Fees of five per cent (5%) of additional assets recovered in the estate proceedings on behalf of the various heirs at law as their proportionate interests appear and costs in the sum of $676.15 requested by Ziontz, Pirtle, Morisset, Ernstoff and Chestnut, though appearing just and reasonable is denied since it appears from the inventory of the estate the assets under this Order received by said heirs are of such a nominal nature as to render the allowance of attorney's fees, as indicated, an unwarranted burden upon the United States.

Dated this 16th day of November, 1979, at Portland, Oregon.

(Signed)
ROBERT C. SNASHALL
Administrative Law Judge